Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,
Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
AND
UNITED STATES OF AMERICA,
AND
DAVID E. ALLGOOD, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE

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MOTION TO ADVANCE

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of national importance which require prompt resolution by this Court for the reasons stated in the annexed petition for a writ of certiorari. It would be desirable for the issues to be decided before the end of the current term of this Court in order to guide the Norfolk School Board as well as the many courts and school boards now making plans for the coming year and to avoid the unnecessary expenditure of the substantial sums of money required by the Court of Appeals for the acquisition of a school bus system, with

the attendant adverse effect on the educational services provided by the Norfolk School Board.

Wherefore, petitioners pray that the Court:

1. Advance consideration of the petition for a writ of certiorari and any response thereto during the current term or, if need be, during the Court's vacation or such special or extended term as may be convenient; and

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate.

Respectfully submitted,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The School Board of the City of Norfolk, Virginia, petitioner, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 7, 1972.

OPINIONS BELOW

Although this proceeding has been pending for more than fifteen years, resulting in a substantial number of opinions of the United States District Court for the Eastern

District of Virginia and the United States Court of Appeals for the Fourth Circuit, the opinions of the courts below directly preceding this petition are as follows:

1. The opinion of the Court of Appeals filed March 7, 1972, not yet reported (Appendix hereto p. 1).

2. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, filed July 28, 1971, not yet reported (App. 24).

JURISDICTION

The judgments of the Court of Appeals were entered on March 7, 1972 (App. 21 and 23). An order was issued by the Court of Appeals on April 3, 1972, staying the mandates until April 18, 1972, in order to permit the defendants to apply for a writ of certiorari or a stay (App. 24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution requires that a school system which has successfully implemented a court approved unitary student assignment plan and which has not historically provided free pupil transportation must now provide free transportation for every student?

2. Whether the court below, which affirmed the trial court finding that there had been "a good faith effort at desegregation on the part of responsible school officials and local government," was empowered to overrule the exercise of discretion by the District Judge and require the School Board to pay counsel fees of plaintiffs?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. Introduction

The petitioners are seeking a review of an *en banc* decision of the United States Court of Appeals for the Fourth Circuit, reversing and remanding, in part, an Order of John A. MacKenzie, Judge of the Eastern District of Virginia, which had held in pertinent part that the Norfolk School Board was not required to provide free transportation for all students and that the plaintiffs were not entitled to an award of counsel fees.

2. Proceedings Below

The District Court on July 15 and 27, 1971, conducted hearings on the plan of the Norfolk City School Board for the operation of its schools for the 1971-72 school year. A memorandum opinion was filed on July 28, 1971.

The District Court held that the student assignment plan satisfied the requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The only question related to student assignment which was before the Court of Appeals was the senior option provision, the validity of which was affirmed by the appellate court. There were some additional objections by plaintiffs to other aspects of the plan; but they were dismissed by the trial court and the appellate court as inconsequential and those points are not pertinent to the present petition.

The holdings of the courts below which are pertinent to this petition are the following:

(a) The District Court held that the Norfolk School Board had no constitutional duty to provide free transportation for every student who lives beyond walking distance from the school to which he is assigned. The Court of Appeals reversed the District Court and held that the School Board was required to provide free transportation.

(b) With respect to plaintiffs' request for counsel fees, the District Court held that there had been "a good faith effort at desegregation on the part of responsible school officials and local government" and that, under the existing case law of the Fourth Circuit, plaintiffs were not entitled to counsel fees. The Court of Appeals stated that it would not disturb the finding of good faith and that plaintiffs were not entitled to counsel fees under its prior decisions. However, the Court of Appeals proceeded to award partial counsel fees on the basis described by it as "a quasi-application of the 'common fund' doctrine." The District Court had not considered the "common fund" doctrine. It was never suggested, briefed or argued by counsel for any party before the courts below.

3. Facts

The Norfolk School System consists of 51,000 students in 70 schools, and the City of Norfolk, 61 square miles in area, has a population of approximately 300,000. Neither the School Board nor the City of Norfolk has ever operated a bus system for the transportation of students to school. The only bus transportation available for the general public was that provided by the Virginia Transit Company, a private corporation, under permit from the City. Histori-

cally, students in the Norfolk system have paid for their own bus transportation. For example, in the 1970 school year, 8,000 students used public transportation at their own expense. The implementation of student assignment plans has greatly increased the number of students requiring transportation.

The two alternative methods under contemplation for providing free transportation have been (a) the payment of students' cost for use of the Virginia Transit Company system or (b) the acquisition and operation of a separate student bus system. Shortly before the decision of the Court of Appeals on March 7, 1972, the Virginia Transit Company served notice on the City of Norfolk that it would terminate service for all passengers as of August 23, 1972. The arrangements for public transportation in Norfolk beginning in September, 1972, are indeterminate now, and a decision as to the method of pupil transportation is an essential element to provision of general public urban mass transit. With respect to the second alternative, the District Court found that the initial cost of acquisition and operation for one year was more than $3,600,000.00. The Court of Appeals held that that amount was not unreasonably burdensome even though its requirement "imposes a substantial expense upon the District which may force it to curtail some other worthwhile services. . . ." The Court of Appeals thus recognized that there would be a reallocation of resources among expenses of education rather than the creation of even a *quasi* "common fund."

REASONS FOR GRANTING THE WRIT

1. Free Pupil Transportation

A. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING JUDICIAL INTERVEN-

TION IN THE EXERCISE OF FISCAL POWERS BY LEGISLATIVE BODIES WHICH WILL HAVE SERIOUS CONSEQUENCES FOR BOTH PUPIL AND PUBLIC TRANSPORTATION IN METROPOLITAN AREAS.

The decision below involves an important federal question which has not been, but should be, settled by this Court, namely the power of the federal courts to order a local government which has not previously operated a bus system to levy and collect taxes for the purpose of providing free transportation to all school students. The question presented affects the taxpayers and school boards of every school system in the country in which free transportation for every student is not now provided. In metropolitan areas, it will have an enormous impact upon general public mass transit and automobile traffic problems.

It should be noted that the Court of Appeals drew no distinction between those students who were assigned to the school closest to their home and those assigned to more distant schools, or between those students as to whom it could fairly be said that the bus fare was an unreasonable burden and those students who were not indigent in that respect. Furthermore, there was no evidence in the record, nor any finding that the desegregation plan was not working or that any child was unable to attend school because of the bus fare. During the current school year, every school in the system is racially integrated.

In effect, the court below has ruled that, if a school board is in the process of implementing a desegregation plan even though the implementation has successfully resulted in a unitary school system, then the school board may not provide free transportation for less than every student in the system. The court recognized that its ruling could require the Norfolk School Board to divert funds from other

worthwhile educational programs. The overly broad principle announced by the court below constitutes the exercise of the budgetary powers customarily reserved to local government and legislative bodies and imposes on the School Board the view of the Court of Appeals as to what constitutes wise economic and social policy. *Dandridge* v. *Williams*, 397 U.S. 486 (1969).

This Court has been unwilling to sanction judicial intervention in the exercise of fiscal powers by legislative bodies, except under unusual circumstances not present here. The first area of exceptions to the general rule consists of cases of default on municipal bonds where the legislative body had at the outset agreed to make the expenditures required and where the remedy involved the payment of a sum certain and not the selection among a number of alternative policy decisions. In other words, the legislative body had exercised its discretion at the time of issuance of the bonds, and all that remained was the ministerial act of satisfying the obligation undertaken by the legislative body. e.g., *Graham* v. *Folsom*, 200 U.S. 248 (1906). A second area of exception to the general rule is illustrated by *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). In that case, this Court held that it was a denial of equal protection under the law for Prince Edward County to close its previously existing schools where the only reason for such closing was the constitutionally impermissible purpose of opposing a desegregation plan. Neither of the exceptions to the general rule is applicable in the present case, for neither the Norfolk School Board nor the City Council nor any other governmental authority has ever operated a bus system.

The question presented here was not decided in *Swann* because the Charlotte-Mecklenburg school system had an

existing student transportation system. *Northcross* v. *Board of Education of Memphis City Schools,* 444 F.2d 1179, 1182 (6th Cir. 1971). This Court has not held that every school system subject to a desegregation order must provide free transportation for every student.

The facts of this case establish that the failure to provide free transportation for all school students is neither an arbitrary nor an unreasonable exercise of legislative discretion. It should be observed that there are many variations in the provision of free goods and services among the school jurisdictions of Virginia, as well as throughout the rest of the country. For example, while Norfolk furnishes free textbooks to most students, Virginia Beach sells textbooks and Chesapeake rents books. Some school systems have kindergarten, while others do not. The Norfolk School Board has exercised its informed judgment to conclude that, in the allocation of scarce financial resources, the provision of free transportation for every student has a lower priority than a number of other educational programs. It is not a question of opposition of the School Board to providing free transportation as a general principle, but the question of fund allocation. The School Board has applied and will continue to apply for and use whatever federal and state funds may become available, whether in the form of grants to the Board specifically for transportation or in such other forms as the inclusion of school transportation allowances in welfare payments to individual families.

B. THERE IS A CONFLICT BETWEEN CIRCUITS CONCERNING PROVISION OF FREE TRANSPORTATION.

The absence of a ruling by this Court on the question presented has resulted in confusion and inconsistent de-

cisions by the lower federal courts. The Court of Appeals for the Eighth Circuit has held that a district court erred in requiring a school district to furnish transportation to every student assigned to a school more than two miles from their homes. *Clark* v. *Board of Education of Little Rock School Dist.*, 449 F.2d 493, 499 (8th Cir. 1971), *cert. den.*, U.S. .... (.....). The Court stated that the school board was not required to provide transportation to those students who continued to attend the secondary school closest to their home. In the present case, the court below rejected the distinction accepted by the Eighth Circuit. There are numerous other school districts, such as Atlanta, Ga., Memphis, Tenn., Louisville, Ky., and Montgomery, Ala., varying in size from the large to the small, which have handled pupil transportation in the same way as Norfolk. In view of the decision below in the Norfolk case, it can be anticipated that the issue of free pupil transportation in such school systems will be frequently recurring. A clear definition of the law is urgently needed before irreversible action is initiated in such cities.

2. Allowance Of Counsel Fees Of Plaintiffs

A. The New Exception Fashioned By The Court Of Appeals To The Established General Rule Prohibiting The Allowance Of Counsel Fees In The Absence Of Statute Has Broad Application And Will Unduly Burden Judicial Administration.

The Court of Appeals, by its *sua sponte* adaptation of a "common fund" doctrine, has enunciated an entirely new rule for the allowance of counsel fees in school desegregation cases. In so doing, it has decided a significant issue of social philosophy which has been much debated. Such debate

has centered around the comparison of the hazards to the administration of justice in the encouragement of frivilous litigation with the equity of sharing the cost of litigation among those receiving its benefits.

The decision as to free transportation serves only to reallocate School Board resources. As there is no "common fund" created, the School Board is directed to pay counsel fees. The effect is that those who lose benefits by the reallocation of funds as well as those who gain free transportation will contribute to any fee payment. If such tenuous finding of the existence of a "common fund" is to be a precedent, the "quasi-application of the 'common fund' doctrine" would be available in all school desegregation cases in which provision of educational services was modified. A further judicial extension of such doctrine to other areas of civil rights litigation would seem natural. The well established general judicial rule has been that attorneys' fees are not ordinarily recoverable in the absence of a statute, with certain limited historic exceptions. The Congress has taken this question of social philosophy to be within its legislative domain and has provided for the allowance of counsel fees in such areas as Equal Employment Opportunities (42 U.S.C. 2000e-5(k)) and Public Accommodations (42 U.S.C. 2000a-3(b)). To date, the Congress has not made any such provision applicable to school desegregation cases. On April 23, 1971, the Senate adopted an amendment to S. 1557, known as the Emergency School Aid Bill, providing for the discretionary allowance by the court of counsel fees in school desegregation cases. 117 Cong. Rec. S5538 (daily ed. Apr. 23, 1971). The House of Representatives has not acted upon S. 1557 and, on November 1, 1971, declined to suspend the rules to take up H.R. 2266 which contained a similar fee allowance provision. 117 Cong. Rec. H 10156-57 (daily ed. Nov. 1, 1971).

With legislation on this subject in this posture in Congress, certainly it is inappropriate for the courts to fashion a broadly applicable new exception to such a well established general rule of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Toy D. Savage, Jr., hereby certify that, on the 13th day of April, 1972, a copy of the foregoing Petition for a Writ of Certiorari and Motion to Advance and Motion to Dispense with Printing was mailed to the following at their respective addresses, first class mail, postage prepaid, in accordance with Rule 33. I further certify that all parties required to be served have been served.

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Decided March 7, 1972

Nos. 71-1900 and 71-1901

* * *

Russell, Circuit Judge:

As a result of the decision of the Supreme Court in *Swann*[1] and *Davis*,[2] this Court vacated the judgments of the District Court in this and four other school desegregation cases and remanded the proceedings to the District Courts having jurisdiction over such cases, with instructions "to receive from the respective school boards new plans (of desegregation) which will (would) give effect to *Swann* and *Davis*," employing in the development of such plans "the use of all techniques for desegregation, including pairing or grouping of schools, noncontiguous attendance zones, restructuring of grade levels, and the transportation of pupils." *Adams* v. *School District Number 5, Orangeburg Co., S. C.* (4th Cir. 1971) 444 F.2d 99, 100, 101.

Upon remand, the school board in this case filed a revised plan of desegregation. Under the restructuring of the schools within the district proposed in such plan, including the pairing and clustering of a number of its schools, large numbers of students were to be assigned to schools beyond normal walking distance from their homes. Objections were entered to this plan by the plaintiffs-appellants, as well as by certain intervenors-cross-appellants; and several hearings were had. After certain changes and modifications had been

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[1] *Swann* v. *Board of Education* (1971) 402 U.S. 1 and 43, 91 S. Ct. 1267 and 1284, 28 L. Ed. (2d) 554 and 586.

[2] *Davis* v. *School Comm'rs. of Mobile County* (1971) 402 U.S. 33, 91 S. Ct. 1289, 28 L. Ed. 2d 577.

made, the District Court approved the plan of desegregation and from this approval the plaintiffs and intervenors have appealed.

The intervenors object that the plan seeks, contrary, as they assert, to the mandate of *Swann*, to balance racially the schools of the defendant district. It is permissible under *Swann* to use racial percentages as a "starting point" for a plan of desegregation. Of course, as *Swann* makes clear (402 U.S. 23-5), these percentages, at best, will be regarded as mere approximations, for, as the Court in *Norwalk Core* v. *Norwalk Board of Education* (2d Cir. 1970) 423 F.2d 121, at p. 122, said:

> "The racial ingredients of schools cannot be prescribed with such certainty of a correct optimum result as might be found in a gourmet cook book specifying the proper portions for a de luxe casserole."

And this is all we construe the plan in this case to do. The intervenors, also, assert that the plan is unacceptable to a large segment of the patrons of the school system and is therefore unworkable. Such objection has been repeatedly disallowed.[3] The last claim raised by the intervenors is that, as a result of the plan, pupils are being subjected to unreasonable risks to their health and safety by the assignments without their neighborhood. This contention, too, is without merit. Even in the illustrations set forth by the intervenors in their brief, bus trips required of pupils under the plan generally fall within a range of thirty minutes each way. This is much less than the three-hour round trip condemned in *Winston-Salem/Forsyth Bd. of Ed.* v. *Scott*, 404 U.S. 1221, 1227, n. 1 (Chief Justice Burger) and found unrea-

[3] See *Watson* v. *Memphis* (1963) 373 U.S. 526, 536-7, 83 S. Ct. 1314, 10 L. Ed. 2d 529.

sonable in *Mims* v. *Duval County School Board* (D.C. Fla. 1971) 329 F. Supp. 123, 133. Nor is it substantially different from the extent of busing required in *Swann* (402 U.S. at p. 30).

A number of the plaintiffs' objections to the plan, as raised in this appeal, are similarly inconsequential and may be dismissed. The allowance of the "rising seniors option," which the plaintiffs argue increased the black proportion in Booker T. Washington High School, and which permits rising seniors, if they so desire, to complete their final year at the school they attended the previous years, will only be effective during the current school year. Its effect on the racial composition of Booker T. Washington High School during 1971-72 has not been substantial. Taking into consideration the considerable changes already made in the assignment of pupils in this school system, we would not be disposed to interfere with this "senior option" plan in the midst of the current school year. Cf., *The Supreme Court, 1970, Term,* 85 Har. L. Rev. 3, 79, note 30. The school system is, also, moving expeditiously towards a proper racial balance in its teaching and administrative staffs. The plaintiffs do not seriously contend otherwise. Under these circumstances, we are inclined to agree with the conclusion of the District Court that judicial action in this connection does not appear presently required. Finally, the school district customarily files regularly with the Court reports of its progress in desegregation. The District Court found the reports as filed adequate and the plaintiffs have pointed to no specific areas in which these reports do not provide sufficient information to the Court. We shall not disturb the finding of the District Court in this regard.

The primary attack of the plaintiffs on the plan is directed at the failure to provide free bus transportation for those

pupils of the District who live beyond normal walking distance from the school to which they are assigned. As previously observed, the plan contemplates the assignment of a substantial number of pupils to schools located beyond walking distance of their homes but provides no means of transportation for pupils so assigned. The plaintiffs assert that, under these circumstances, the maintenance by the School District of a busing program for pupils who are not within walking distance of their assigned school is a necessary corollary to the assignment itself. They echo the comment of another Court, faced with a similar problem, that, it is "ridiculous to assign students to schools which they cannot reach." *Davis* v. *Board of Education of North Little Rock, Ark.* (D.C. Ark. 1971) 328 F. Supp. 1197, 1203. While conceding that the School District has not heretofore operated a bus system or provided free busing,[4] they would find no more merit in the argument that this justifies failure to provide transportation than in the argument in the earlier stages of this proceeding against a duty to assign pupils outside their neighborhood for purposes of eliminating the vestiges of desegregation. They say the two requirements—to assign and to provide transportation—go hand-in-hand—and one without the other is useless. They dismiss as unacceptable the suggestion that the pupils should avail themselves at their own expense of the facilities of the local private bus transportation system to reach their assigned school. They point out that, under the present rates, these pupils would be required to pay $45 per school year for transportation and, under a set of proposed rates which

[4] The same situation prevailed in the school district whose plan of desegregation was reviewed in *Davis* v. *Board of Education of North Little Rock, Ark., supra.* Cf., however, *Norwalk Core* v. *Norwalk Board of Education* (D.C. Conn. 1969) 298 F. Supp. 213, at p. 224, aff. 423 F. 2d 121.

will soon become effective, $63 per year. A substantial number of the students reassigned come from families for whom these expenditures could be an unreasonable, if not an intolerable, burden. It was largely to safeguard the constitutional rights of this group of students that the plan of desegregation was promulgated. The plaintiffs urge that if the Court, after providing for their reassignment, takes no steps to make available to them, without cost, busing to the schools to which they are assigned, the whole plan of desegregation becomes a futile gesture and will represent for the disadvantaged child, intended to be protected thereby in his constitutional rights, a cruel hoax. This argument persuades; it also accords with our understanding of *Swann* and *Davis*, both of which recognized and enforced "the district court's equity power to require transportation whenever and wherever necessary to disestablish a dual school system."[5]

It is regrettable that the requirement that the School District furnish busing for these students assigned beyond walking distance from their homes imposes substantial expense[6] upon the District which may force it to curtail some

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[5] *United States* v. *Watson Chapel School District No. 24* (8th Cir. 1971) 446 F.2d 933, 937.

[6] This is not to indicate that the expense of busing may never be so unreasonably burdensome as to warrant denial of the relief. What we conclude is that the cost of busing in this case is not so unreasonably burdensome. This we think is evident both from the findings of the District Court and from the record. The District Court found the cost of installing and operating a transportation system by the school district to be $3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would

other worthwhile services, but, if reassignment is mandated constitutionally, it must be effective and meaningful and "more than a matter of words."[7] To repeat, the Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school.

The school district has indicated that if the District is required to operate a bus system for the transportation of its pupils, the loss of revenue thereby occasioned to the local private transportation system will render such system unprofitable and lead to its discontinuance, with resulting inconvenience to the entire community. The local transportation system, on the other hand, cannot be, as it were, subsidized at the inconvenience of, and in denial of the constitutional rights of, the students. It is possible, however, as we have already indicated, that the school district may find it both practical and economical to utilize the services of the

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be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable. See 85 Har. L. Rev. 83, note 61. Of course, it might be less expensive for the district to make an arrangement with the local bus system. Legislation is now being proposed in the Virginia Legislature to provide State financial support for private bus firms that carry children to school. *Richmond Times-Dispatch*, Section B, p. 1, February 9, 1972. The use of the private bus system in this situation may be both a practical solution for the school's problem and a means of financial relief for the private bus system itself. The relative merits of the two possibilities, i.e., the operation of its own bus system or the utilization of the services of the existing private bus service—are, however, for the initial consideration of the trustees of the school district and the District Court.

[7] See *Bradley* v. *School Board of City of Richmond, Virginia* (4th Cir. 1965) 345 F.2d 310, 323 (concurring and dissenting opinions of Judges Sobeloff and Bell), remanded, 382 U.S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187.

local bus system in discharging its obligation to provide adequate transportation for pupils assigned to schools beyond walking distance from their homes.[8] Whether this is a practical solution is a matter that may be considered by the District Court on remand. What is determined here is that the school district as a part of its plan of desegregation, must provide a practical method of affording *free* busing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty are for the District Court.

Finally, the plaintiffs ask that an allowance of attorney's fees be provided as a part of their taxable costs herein. In support, they cite *Bradley* v. *School Board of Richmond, supra* (345 F.2d p. 321). The federal rule, oft repeated, is that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Corp* v. *Maier Brewing* (1967) 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; *Leary* v. *United States* (4th Cir. 1919) 257 Fed. 246, 250, aff. 253 U.S. 94, 40 S. Ct. 446, 64 L. Ed. 798; *McCraw* v. *United Ass'n of Journey. & App. of Plumbing, etc.* (D.C. Tenn. 1963) 216 F. Supp. 655, 664, aff. 341 F.2d 705.[9] To this rule, courts

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[8] Actually, the requirement that the school district provide free transportation, if complied with through some arrangement with the local bus sysem, may be the only means of preserving such system. See *Richmond Times-Dispatch*, Section B, p. 1, February 9, 1971, cited in note 6.

[9] In *Fleischmann* the Court observed that one of the reasons for the denial is that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose subsantial burdens for judicial administration." 386 U.S. 718. See, also, *Lee National Corp.* v. *Kansas City Southern Industries, Inc.* (D.C. N.Y. 1970) 50 FRD 412, 414, for a statement of other reasons; and *Monolith Portland Midwest Co.* v. *Kaiser Aluminum & C. Corp.* (9th Cir. 1969) 407 F.2d 288, 293-4.

of equity, as *Fleischmann* adds, have established certain limited historic exceptions. These exceptions are confined to those unique and special cases involving "compelling circumstances"[10] and " 'overriding considerations of justice,' "[11] where to deny allowance would result in "gross injustice."[12] The most frequent exception occurs where "a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself"[13] and is usually "one where through the complainant's efforts a fund is recovered in which others share."[14] The rationale for this exception is that it is only fair that he who creates or conserves a common fund or property should be reimbursed for his reasonable expenses, including attorney's fees, for protecting the common fund for others having a similar interest with him in that fund. *Gibbs* v. *Blackwelder* (4th Cir. 1965) 346 F.2d 943, 945; *United States* v. *Jacobs* (D.C. Md. 1960) 187 F. Supp. 630, 634, aff. 298 F.2d 469.[15] The doctrine extends not only to

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[10] *Bradley* v. *School Board of Richmond, supra* (345 F.2d p. 321).

[11] *Fleischmann Corp.* v. *Maier Brewing, supra*, p. 718; *Siegel* v. *William E. Bookhultz & Sons, Inc.* (D.C. Ct. 1969) 419 F.2d 720, 722-3.

[12] *Monolith Portland Midwest Co.* v. *Kaiser Aluminum & C. Corp., supra*, at p. 294; see, also, *Rolax* v. *Atlantic Coast Line R. Co.* (4th Cir. 1951) 186 F.2d 473, 481.

[13] *Mills* v. *Electric Auto-Lite* (1970) 396 U.S. 375, 392, 90 S. Ct. 616, 24 L. Ed. 2d 593.

[14] *Sprague* v. *Ticonic Bank* (1939) 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184.

[15] 3 Barron & Holtzoff, *Federal Practice & Procedure* (Rev. Ed. 1958) p. 67, states the rationale thus:

> "The allowance of extraordinary costs 'as between solicitor and client' rests upon recognized equitable principles and may be made whenever the burden of litigation assumed by the prevailing party substantially benefits others who should in equity contribute to the expense."

cases in which a fund is either created or protected but also "where the effect of the suit is the same as though a fund were created." 6 Moore's *Federal Practice*, p. 1351; *Sprague* v. *Ticonic Bank, supra* (307 U.S. pp. 165-7). The purpose of the award in such case, however, is not designed "as an additional recovery against the wrongdoers, but as a means of ordering compensation to counsel from the class benefited." *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire & Eng.* (D.C. Ct. 1971) 442 F.2d 812, 823. The other normal exception to the general rule is illustrated by those "exceptional cases" "where the behavior of a litigant has reflected a wilful and persistent 'defiance of the law,' "[16] or where "an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.[17] This exception is inapplicable, however, "where litigation was pursued on a matter as to which prior decisions left a lingering doubt."[18] Whether the conduct of the party in maintaining his action or defense was in bad faith without any basis in law or fact and represented "obdurate obstinacy" is ordinarily a matter committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances." *Bradley* v. *School Board of City of Richmond, Virginia, supra* (345 F.2d p. 321);

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[16] *Kahan* v. *Rosenstiel* (3d Cir. 1970) 424 F.2d 161, 167, cert. den. 398 U.S. 950.

[17] 6 Moore's *Federal Practice, supra*, p. 1352; *Newman* v. *Piggie Park Enterprises* (1968) 390 U.S. 400, 402, note 4, 88 S. Ct. 964, 19 L. Ed. 2d 1263; *Undersea Eng. & Const. Co.* v. *International Tel. & Tel. Corp.* (9th Cir. 1970) 429 F.2d 543, 545; *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.* (5th Cir. 1971) 441 F.2d 631, 636-7; Note, 8 L. Ed. 2d 912.

[18] *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire. & Eng., supra*, at p. 824; *Local No. 149 I. U., U.A., A. & A.I.W.* v. *American Brake Shoe Co.* (4th Cir. 1962) 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

Williams v. *Kimbrough* (5th Cir. 1969) 415 F.2d 874, 875; cert. den. 396 U.S. 1061; *Cappel* v. *Adams* (5th Cir. 1970) 434 F.2d 1278, 1279-80; *Simler* v. *Conner* (10th Cir. 1965) 352 F.2d 138, 140-1, cert. den. 383 U.S. 928; *Lucerne Investment Company* v. *Estate Belvedere, Inc.* (3d Cir. 1969) 411 F.2d 1205, 1207.

This Court was the first Circuit to approve the grant of attorney's fees in school desegregation cases. *Bell* v. *School Board of Powhatan County, Virginia* (4th Cir. 1963) 321 F.2d 494, 500,[19] and *Bradley* v. *School Board of City of Richmond, Virginia, supra.* In so doing, we laid down the rule that such award was warranted under the exception that permitted such allowance where an unfounded action is brought or maintained in bad faith; specifically, we held that the right was limited to "the extraordinary case" and was "appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy,"[20] or persistent defiance of law.[21] This doctrine, thus enunciated by this Court, has been uniformly followed in the other Circuits where an award has been considered; and allowances have been made only where there has been a finding of "unreasonable, obdurate obstinacy" or persistent "defiance of law." Accordingly, in *Felder* v. *Harnett County Board of Education* (4th Cir. 1969) 409 F.2d 1070, 1075; *Kemp* v. *Beasley* (8th Cir. 1965) 352 F.2d 14, 23; *Williams* v. *Kimbrough* (D.C. La. 1969) 295 F. Supp. 578, 587, aff. 415 F.2d 874, cert. den. 396 U.S. 1061; *Rogers* v. *Paul* (D.C. Ark. 1964) 232 F. Supp. 833, 843, aff. 345 F.2d 117, remanded on other grounds, 382 U.S. 198; *Stacy* v. *Wil-*

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[19] Bell is favorably commented on in 77 Har. L. Rev. 1135 (1964).

[20] 345 F.2d at p. 321.

[21] 321 F.2d at p. 500.

liams (D.C. Miss. 3-Judge Court, 1970) 50 FRD 52, 55, aff. 446 F.2d 1366; *Haining* v. *Roberts* (D.C. Miss. 3-Judge Court, 1970) 320 F. Supp. 1054, 1063; *Wright* v. *County School Board of Greensville County, Va.* (D.C. Va. 1966) 252 F. Supp. 378, 385, remanded on other grounds 442 F.2d 570; *Brown* v. *County School Board of Frederick County, Va.* (D.C. Va. 1964) 234 F. Supp. 808, 811, remanded on other grounds, 346 F.2d 22; *Betts* v. *County School Board of Halifax County, Virginia* (D.C. Va. 1967) 269 F. Supp. 593, 604, and *Franklin* v. *County School Board of Giles County* (D.C. Va. 1965) 242 F. Supp. 371, 377-8, rev. on other grounds, 360 F.2d 325, the Court, applying *Bell* and *Bradley*, found that the action of the school boards did not amount to "unreasonable, obdurate obstinacy" or persistent "defiance of law" and denied attorney's fees.[22]

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[22] These cases were summarized in *Haining* v. *Roberts*, *supra*, at p. 1063, thus:

> "In the exercise of this equitable discretion (to allow attorney's fees) in civil rights cases, courts have generally denied the extraordinary relief of awarding attorney's fees absent a finding of 'unreasonable, obdurate obstinacy' on the part of the defendant."

It has been suggested that in certain civil rights cases, counsel really act as "private attorneys general" and, though there is no statutory provision for an award of counsel fees, such award is within the discretion of the Court. This was the basis of the decision in *Lee* v. *Southern Home Sites Corp.* (5th Cir. 1971) 444 F.2d 143, 147-8, where an award of counsel fees was authorized in a suit under Section 1982, 42 U.S.C. The reason for such ruling was that the right asserted by the complainant, though involving public policy, "under present judicial development, *depends entirely on private* enforcement." (Italics added.) A similar conclusion was reached in *Miller* v. *Amusement Enterprises, Inc.* (5th Cir. 1970) 426 F.2d 534, 537-8, where, in justifying an award in a Title II action of counsel fees to "private Attorneys General," the Court said that the "effectuation of this policy (of the Act) was primarily to be achieved through private suits by individuals. This flowed to a large extent from one of the great compromises in this and related legislation. The role of the Attorney General as the chief legal officer was markedly curtailed.

On the other hand, again applying the rule enunciated in *Bell* and *Bradley*, the following decisions found either a "long continued pattern of evasion and obstruction" as found in *Bell* or "unreasonable, obdurate obstinacy" as found in *Bradley*, and, based on such finding, made an award of attorney's fees: *Nesbit* v. *Statesville City Board of Education* (4th Cir. 1969) 418 F.2d 1040, 1043; *Brown* v. *County School Board of Frederick County, Virginia* (4th Cir. 1964) 327 F.2d 655 (remanded for consideration of allowance of attorney's fees in light of *Bradley* and *Bell*); *Griffin* v. *Board of Supervisors of Prince Edward County* (4th Cir. 1964) 339 F.2d 486, 493, reversed on other grounds, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed 2d 256 (where action was "taken to evade and defeat" the mandate of the Court); *Clark* v. *Board of Education of Little Rock School District* (8th Cir. 1966) 369 F.2d 661, 670-1 and

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True, he may bring suit, but only under the limiting circumstances of a 'pattern of practice' of discrimination. And the right of intervention, which is ordinarily accorded under liberalized circumstances, is confined to cases which the Attorney General certifies as being of 'general public importance'—the same added factor which can trigger a three-judge court suit." It is doubtful that the same reasoning would apply to school desegregation actions. To achieve school desegregation, the Attorney General, in any "meritorious" case, upon receipt of a written complaint, is authorized to sue on behalf of any person unable, in his opinion, "to bear the expense of the litigation." Section 2000c-6(b), 42 U.S.C. In addition, the Department of Health, Education and Welfare has a responsibility to see that every school receiving any federal assistance (and, for practical purposes, it may be assumed all do) is desegregated. Section 2000-d, 42 U.S.C. These several provisions of the Civil Rights Act of 1964 mean, as one commentator has phrased it, that, "Every federal agency is instructed to act to implement this pronouncement" against school discrimination and HEW specifically is directed "to assume responsibility for seeing that every school in the United States was (is) desegregated." Note, *The Courts, HEW, and Southern School Desegregation*, 77 Yale L. J. 321, at p. 322 (1967). But, cf., *Bradley* v. *School Board of City of Richmond, Virginia* (D.C. Va. 1971) 53 FRD 28, 41.

449 F.2d 493, 499 (where the Court found in earlier case "obstinate, adamant, and open resistance to the law" on the part of the school board); *Hill* v. *Franklin County Board of Education* (6th Cir. 1968) 390 F.2d 583, 585; *Monroe* v. *Board of Com., City of Jackson* (D.C. Tenn. 1965) 244 F. Supp. 353, 365-6, rev. on other grounds, 380 F.2d 955, and 391 U.S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733; *Rolfe* v. *County Board of Education of Lincoln Co., Tenn.* (D.C. Tenn. 1966) 282 F. Supp. 192, 201, aff. 391 F.2d 77, 81; *Cato* v. *Parham* (D.C. Ark. 1968) 293 F. Supp. 1375, 1378, aff. 403 F.2d 12, further proceedings, 302 F. Supp. 129, 136 and 316 F. Supp. 678, 685; *Kelly* v. *Altheimer, Arkansas Public School Dist. No. 22* (D.C. Ark. 1969) 297 F. Supp. 753, 758-9, rev. and remanded on other grounds 378 F.2d 483; *Pettaway* v. *County School Board of Surry County, Va.* (D.C. Va. 1964) 230 F. Supp. 480, 487 (citing and following *Bell*), remanded on other grounds 339 F.2d 486.[23] It would seem clear, then, that the award of attorney's fees in school desegregation cases is normally governed by the rules enunciated in *Bell* and *Bradley* and only if the facts in the case accord with the test enunciated in those cases is an award generally permissible.

The District Court in this case made a specific finding that there had been "a good faith effort at desegregation on the part of responsible school officials and local government" and, applying the rule stated in *Bradley*, denied relief. We find no "compelling circumstances" for disturbing this finding of good faith. The mere fact that the school district's plans, as developed in hearings before the District Court,

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[23] Cf., *Dyer* v. *Love* (D.C. Miss. 1969) 307 F. Supp. 974, 987, which relied on *Bell* and *Bradley* to support award of attorney's fees in an apportionment case where the conduct of the defendants had been found to represent "unreasonable, obdurate obstinacy."

may have been invalidated by subsequent clarifying decisions of the Supreme Court is insufficient to establish bad faith on the part of the school board. Cf., *Local No. 149, I. U., U. A., A. & A. I. W.* v. *American Brake Shoe Co., supra,* at p. 216; *Rogers* v. *Paul* (8th Cir. 1965) 345 F.2d 117, 125-6. This Court itself did not anticipate the subsequent rulings of the Supreme Court in this area of school desegregation on a number of occasions.[24] We cannot fault the school board because it did not demonstrate greater powers of clairvoyance than either the District Court or this Court in anticipating the extrapolations of *Brown* by the Supreme Court. This conclusion disposes of the plaintiffs' claim for the allowance of attorney's fees based on any claim under *Bradley*.

There is, however, a unique feature of this case, involving at least a quasi-application of the "common fund" doctrine. It relates to the special relief granted by this decision and denied by the District Court. The plaintiffs have by this appeal secured for the students of this school system an additional right, a right of direct *pecuniary* benefit for all students assigned to schools without their neighborhood, a right not given them under the plan approved by the District Court. It is true the right is not represented by a "common fund" and has not resulted in a monetary recovery, against which attorney's fees may be charged but, so far as the students affected are concerned, "the effect * * * is the same as though a fund were created." 6 Moore's *Federal Practice, supra; Sprague* v. *Ticonic Bank, supra.* The students have secured a right worth approximately $60 per year to each of them. This *pecuniary* benefit to the students

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[24] See *Green* v. *County School Board* (1968) 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, and *Swann* v. *Board of Education* (1971) 402 U.S. 1, and 43, 91 S. Ct. 1267 and 1284, 28 L. Ed. (2d) 554 and 586.

involved would under normal circumstances, warrant the imposition of a charge against them for their proportionate share of a reasonable attorney's fee incurred in securing such *pecuniary* benefit for them. It is not practical, however, to do this in this case and, too, to do so would defeat the basic purpose of the relief provided by the amendment in the decree, which was to secure for the student concerned transportation *without cost or deduction*. The only feasible solution in this peculiar situation would seem to lie in requiring the school district itself to supplement its provision of free transportation with payment of an appropriate attorney's fee to plaintiffs' attorneys for securing the addition of such a provision to the plan of desegregation. There are thus "dominating reasons" under the "exceptional circumstances" of this case to award attorney's fees for the services of plaintiffs' attorneys in securing for these students this *pecuniary* benefit. Cf., *Sprague* v. *Ticonic Bank*, *supra*.

In keeping with the foregoing conclusions, this cause is remanded to the District Court with direction (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes, and (2) to award reasonable attorney's fees to plaintiffs' attorneys as a part of the taxable costs herein for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Remanded With Directions.

Winter, Circuit Judge, concurring specially:

I concur in the majority's opinion except in regard to what is said with respect to the allowance of counsel fees. I would direct the allowance of counsel fees—and hence I also concur in this part of the judgment—but I would do so on a basis different from that expressed by the majority.

For a circuit which has been the leader in the allowance of counsel fees in school desegregation cases, Bell v. School Board of Powhatan County, Virginia, 321 F.2d 494 (4 Cir. 1963); Brown v. County School Board of Frederick County, Virginia, 327 F.2d 655 (4 Cir. 1964); Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486 (4 Cir. 1964), reversed on other grounds, 377 U.S. 218 (1964); Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4 Cir. 1969), I think that the court takes a false turn when it rests the allowance in this case on a quasi-application of the "common fund" doctrine. Sprague v. Ticonic Bank, 307 U.S. 166 (1939), in which this doctrine was announced, gives little support to the majority's result. There, there was a fund, and the fund was *more* than sufficient to pay all claims. The allowance was prayed to be paid out of the fund. Presumably, therefore, recovery on the claim would not be diminished by the allowance. 307 U.S. at 163. The only question was whether an allowance from the fund was proper when there was not a true class suit. It was held that since plaintiff's recovery was res judicata of the claims of other potential plaintiffs similarly situated, the allowance could properly be made. Here, as the majority recognizes, there is no fund and it is necessary for the majority in effect to create one so that plaintiffs' lawyers can be compensated.

Conceptually, I see grave difficulties with correlating the award of counsel fees to pecuniary benefits to plaintiffs. The

objective in a school desegregation case is the vindication of human rights and human rights are rarely translatable into dollar values. Of course, in this case it can be said that plaintiffs will be granted something having a measurable, pecuniary benefit, but in other cases where the right vindicated is not just lack of transportation, which carries a price tag, I can visualize substantial problems in determining whether the vindicated right has an ascertainable monetary value. And even in this case I am left in doubt of the extent to which, if any, the aggregate pecuniary benefit to all of the plaintiffs is to be considered in determining the amount of the allowance to their attorneys. Ordinarily, aggregate monetary recovery is a substantial factor in fixing a fee for legal services. And if difficult here, assuming that total recovery is an element to be considered, what difficulties will arise in future cases where such a convenient measure of the pecuniary benefit is not at hand?

Where the court goes wrong is in its failure forthrightly to recognize that the decisions in the area of school desegregation subsequent to Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown I*), all hold that *Brown I* means just what it says and that beginning in 1964 the Supreme Court has said repeatedly that further delay in its full implementation will not be tolerated. Griffin v. School Board, supra; Green v. County School Board of New Kent County, 391 U.S. 430 (1968); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969). I find quite unpersuasive the implied assertion that *Brown I* required, or was afforded, subsequent clarification, or that clairvoyance was required to foresee the result in Green v. County School Board, supra, and Swann v. Board of Education, 402 U.S. 1 (1971). The only change in the course of

direction of *Brown I* that I have been able to perceive is abandonment of the mandate of "all deliberate speed," as announced in Brown v. Board of Education, 349 U.S. 294, 301 (1955) (*Brown II*), and the substitution of "at once" and "now," as announced in *Griffin, Green, Holmes* and *Carter*. This change of direction in the immediacy of the application of *Brown I* does not dilute, modify or alter its substance, but I think it requires an extension of the rule we initially announced in *Bell*.

In Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), it was held, in a suit brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination at five drive-in restaurants and a sandwich shop, that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. 402. The rationale of the holding was "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."

Of course, in *Newman* there was a statute authorizing an award of counsel fees in a suit brought under *Title II* of the Act, and, strictly read, *Newman* simply decided how the statute should be applied. But the lesson to be learned from *Newman* is directly applicable here. We have the authority to award counsel fees in this equitable action; no statute is required. True, up to now, we have awarded them only "when it is found that the bringing of the action [to desegregate effectively] should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." Bradley v. School Board of City of Richmond, Virginia, 345 F.2d 310, 321 (4 Cir. 1965). Such an applica-

tion was proper in the context of "all deliberate speed" because; there, there was room for legitimate debate as to the period of time within which the conflicting demands of aggrieved plaintiffs and the community interest in a smooth, uneventful transition to a unitary system of public education were to be accommodated. But *Griffin, Green, Alexander* and *Carter* have created a different context. By now the transition should have been accomplished. If it has not, the burden of persuasion to explain the delay should rest on those who have the power to accomplish the objective but who have failed to achieve it, and not on those whose rights continue to be violated. It seems to me, therefore, to be appropriate now to hold, in the light of those cases, that reasonable and adequate counsel fees should be awarded as of course unless special circumstances would render an award unjust.

There is every reason to arrive at this result. Despite the extensive enforcement responsibilities the statutes place on the Departments of Justice and Health, Education and Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. The Department of Justice has not appeared in this stage of this very case. Indeed, it has appeared at only one stage of the tortuous history of the desegregation of the Norfolk schools. Brewer v. School Board of City of Norfolk, Virginia, 434 F.2d 408 (4 Cir. 1970). Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation. The time is *now* when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of "unreasonable, obdurate obstinacy."

If we were to adopt the rule I champion, I could not find in the light of *Swann* and Davis v. School Comm'rs. of Mobile County, 402 U.S. 33 (1971), that there are any special circumstances rendering an award of counsel fees unjust. Hence, I join in directing that counsel fees be awarded.

JUDGMENT

Entered March 7, 1972

United States Court of Appeals
for the
Fourth Circuit

No. 71-1900

Carlotta Mozelle Brewer and Demetria Yvonne Brewer, infants by Oner Brewer, their father and next friend, et al., Appellants,

vs.

The School Board of the City of Norfolk, Virginia, et al., Appellees.

Appeal from *the United States District Court for the* Eastern *District of* Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Eastern *District of* Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, and this cause, be, and the same is hereby,* remanded to the United States District Court for the Eastern District of Virginia, at Norfolk with directions (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes, and (2) to award reasonable attorney's fees to

plaintiffs' attorneys as a part of the taxable costs herein for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Samuel W. Phillips
Clerk

JUDGMENT

Entered March 7, 1972

United States Court of Appeals

for the

Fourth Circuit

No. 71-1901

Carlotta Mozelle Brewer and Demetria Yvonne Brewer, infants by Oner Brewer, their father and next friend, et al.,

Appellees,

vs.

David E. Allgood, infant, etc., et al.,

Appellants.

Appeal from *the United States District Court for the* Eastern *District* of Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Eastern *District of* Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* remanded to the United States District Court for the Eastern District of Virginia, at Norfolk with directions (1) to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by the operation of a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes,

and (2) to award reasonable attorney's fees to plaintiffs' attorneys as a part of the taxable costs herein, for their services in securing an amendment in the plan of desegregation to provide for such free transportation.

Samuel W. Phillips
Clerk

Nos. 71-1900 and 71-1901

ORDER

Entered April 3, 1972

After due consideration of the motion for stay of mandate herein and after consultation with all members of the Court,

It Is Hereby Ordered, That the mandate of this Court in the above case be stayed until April 18, 1972, in order to permit the defendants to apply to the Supreme Court for a writ of certiorari, or to apply to that Court for a stay.

MEMORANDUM OPINION

Entered July 28, 1971

Encouraged by the patent spirit of cooperation manifested in the recent hearings in this case, we are happily optimistic that Beckett, et al. v. The School Board of the City of Norfolk, et al., filed in May, 1956 may be progressing to a belated but final conclusion.

Under the mandate of *Swann* v. *Charlotte-Mecklenberg Co. Board of Education*, ... U.S. ..... (April 20, 1971), and the directions issued on remand of that case from the United States Court of Appeals for the Fourth Circuit, on June 6, 1971, the School Board of the City of Norfolk has

proposed its plan for the operation of its schools for the year 1971-1972, a plan which uses single school attendance areas, pairings and groupings of schools in both contiguous and non-contiguous attendance zones and extensive bus transportation to achieve the greatest possible degree of actual desegregation.

The Plan, to be successful in its operation, will require the maximum collective efforts of the School Board, school administrators, school teachers, parents of both races, the affected children and the public at large. To augment those efforts, this court here demonstrates its confidence and support of the proposed Plan and urges cooperation of the citizens of Norfolk.

The Plan as submitted and amended by the Norfolk School Board, attached hereto as Appendix "A," is approved.

In general profile, the Plan will require that many thousands of students will be involved in mass busing. Often the trips will be long and tedious for children of tender age. Parents of both races have expressed their opposition, but, always in good grace and to date, always within the posture of proper legal proceedings. It is hopeful that the inconvenience, expense and the magnitude of the busing can be appropriately reduced in time, but under the course presently prescribed by appellate courts, the School Board has been wise in its proposal. In my judgment, never has a more dedicated School Board struggled with a more complex problem.

The School Board Plan for Norfolk encompasses 54,000 students in five high schools, ten junior high schools and fifty-four (54) elementary schools, a total of sixty-nine (69) schools.

The plaintiffs originally raised objections to the Plan as to pupil attendance in only two schools, Tucker Elementary and Campostella Heights Elementary. Tucker, under the original plan, remained 100% black and arguably with some valid reasoning. Nevertheless this court was constrained to reject the plan as to this single uniracial school as not meeting the tests recently announced in *Swann* v. *Charlotte-Mecklenburg County Board of Education*, ... U.S. ..... (April 20, 1971). As a result, complying with the order of this court dated July 19, 1971, the School Board submitted an amended plan. Under the amendment Tucker is paired with Norview Elementary. Prior to its pairing with Tucker Elementary, Norview Elementary with 750 students, as a single attendance area school, represented a racial ratio of 63% white, 37% black. Tucker Elementary, with 460 students as stated, was 100% black. Under the amended plan and the pairing of these two schools, Norview Elementary with grades 1-3, will present a racial ratio of 41% white, 59% black. Tucker's racial ratio, in grades 4-6, will be 52% white, 48% black. The uniracial status of Tucker Elementary is thus removed.

Campostella Elementary, with an enrollment of 175 carries a racial ratio of 70% black and 30% white. There is, therefore, a departure from the plan of 60% white, 40% black, the city-wide racial ratio the School Board has conscientiously tried to apply but which cannot always be adhered to. Dr. Stolee, plaintiffs' expert witness, whose "Plan C" has previously been viewed with favor by the Fourth Circuit, had previously advocated leaving this school untouched under that "Plan C." The evidence shows that the area surrounding Campostella Elementary is integrated in fact and is stable in terms of acceptance by those in the the neighborhood itself. Statistics reveal that the Negro majority in the school has decreased about 5% in the last

20 months. No change in attitude or result, other than continued quiet integration of the neighborhood, is foreseen. To attempt to pair this school and reduce its black-white ratio would at the same time change the delicately balanced and acceptable ratio in one or more other schools, and at great disruptive cost. In leaving the racial composition of Campostella and its 70% black, 30% white enrollment as it is, the court is convinced that such composition is not representative of discrimination and is balancing itself in a stabilized community. The United States had no objection to the Campostella Heights plan of the Board.

This court is of the opinion that the School Board in its amended plan for racial distribution of student enrollment has made every effort to achieve the greatest possible degree of actual desegregation under the tests of *Swann, supra*. The objections of the plaintiffs are Denied. The objections, on other grounds, of both sets of intervenors, are likewise Denied.

The plaintiffs' exception to the Norfolk Plan for its failure to provide for a reporting procedure is premature. All of the evidence, which plaintiffs cannot counter, is that regular reports are now, and have been promptly made by the School Board as soon after the opening of schools as the appurtenant statistics are available.

There has been no showing of any failure to report or of any failure to provide information requested.

The general rule is that there is no duty to provide free transportation of children to a public school system absent a statute which requires this activity. 79 C.J.S., *Schools and School Districts*, § 475(2).

Virginia, by statute, leaves transportation of school children, in its cities, to the discretion of the City School Boards:

> "City School Boards may provide for the transportation of pupils; but nothing herein contained shall be construed as requiring such transportation. . . ." Va. Code Ann. § 22-97.1.

No attack is here mounted against this statute. No discrimination in its origin or effect is here evident. It applies to all cities and their populations without regard to race and is in accord with generally accepted legal principles.

Quite properly, the matter should be left with the School Board and the City of Norfolk. Funding of such a project would be most difficult. In this case, the credible evidence places the initial cost at more than $3,600,000.00. For the School Board to request and the City to raise such a sum would be primarily a matter of an increase in taxes or a bond issue, peculiarly a City problem to be considered in the light of all of its other financial affairs. In short, free school transportation is a legislative prerogative and not the proper subject of judicial fiat on the strength of the facts of this case. The suggestion by plaintiffs made in argument that the white flight which might flow from the execution of the proposed Norfolk Plan may so materially reduce the number of teachers as to thus make funds for pupil transportation available to the School Board within its present budget is in reality a better ground to refuse the Plan than to provide free transportation.

The only Cities in Virginia which have exercised their discretion in favor of free school transportation (and usually only in a segment of such city, newly annexed) have done so under the impact of annexation decrees or merger

agreements in which sizeable portions of rural, former county areas, theretofore serviced by school buses, have been joined to cities. Such is the case in Chesapeake, created by the merger of Norfolk County and the City of South Norfolk; Virginia Beach as the result of its merger with Princess Anne County; the Henrico County, Chesterfield County and the City of Richmond annexation decree.

Swann, supra, is not authoritative in this field. No specific language therein directs free transportation in the busing which it says is to be employed as a tool of desegregation. On page 26 of the slip opinion in *Swann,* a footnote carefully points out that North Carolina, by statute, requires the busing of students who live more than 1½ miles from the school they attend. N.C. Gen. Statute 115-186(b). In Virginia the law as to cities is to the contrary.

Manifestly, enforced busing does work a hardship on indigent students. The Chairman of the Norfolk School Board indicated every effort was being made to find a solution to offer free transportation in this limited field, but like school lunches and free text books, the ultimate decision in such economic matters is for the School Board of the City, not the courts.

Amidst the efforts towards legal and mechanical compliance with judicial desegregation edicts, the "rising senior option" provision of the Norfolk Plan is the only bright spark of humanism. A student completing his junior year has the option to remain in the same school to complete his senior year. The provision applies alike to black and white and could be hardly less discriminatory. The plaintiffs in argument, freely admit that it is a rule of great benefit to students of both races. As a matter of fact,

the only objection raised by the plaintiffs is over the *possibility* of a swing of less than 10 percentage points in the black-white ratio in one high school, Booker T. Washington.

When one compares this picayune exception with the mammoth good the senior option offers, this court unequivocally approves the provision. In the first place, seniors represent the leadership in high schools. It is this group that encompasses most of the elective officers positions of prominence in school organizations, choral groups, bands, marching corps, and officers in reserve groups. Of great importance, also, the outstanding members of athletic teams, are usually seniors. Having progressed to these positions of prominence, academic, extra-curricular and athletic, the importance of giving these students, black or white, their great day in the sun becomes obvious. For many, it will be their last days of education and a chance to develop the leadership and responsibility which maturing years have thrust their way and which they have evidenced their acceptance. For many others, it will be the sole opportunity to secure scholarships by academic excellence and through athletic prowess in an atmosphere to which they have grown accustomed and which would most successfully foster their talents. For many it is a continuation, to an apex, of a relationship with dedicated guidance counsellors who have been mapping student careers towards college attendance, or employment after graduation. This is a program in which carefully nurtured mutual understanding and confidence would be totally destroyed were the counselling relationship to be broken and the student summarily directed to another school. And of great importance, as pointed out by Norfolk's enlightened Chairman of the School Board, in previous hours of strain in the fields of

school discipline and other social problems, student leadership and assistance administered by those mature seniors who have acquired status and to whom their juniors look for guidance on a day-to-day basis has been a significant aid.

To disturb all of this over the possibility of a swing of a few ratio percentage points in one school in sixty-nine is a course this court would not choose to follow.

A majority-minority transfer provision, with attendant transportation costs borne by the School Board, recognized as a necessary adjunct to desegregation in *Swann, supra,* will be retained in the Norfolk Plan. If it is not now literally written therein, it will be so considered by virtue of this Opinion and subsequent Order. Only forty-eight (48) students availed themselves thereunder in 1970-1971.

A specific provision in the Plan to call for a minimum number of black administrators and teachers in the system is not necessary, as no problem in that field has been presented or suggested. The evidence before the court is that the number of black teachers and black supervisors has been increasing year by year in the Norfolk system. Efforts in this direction by the Norfolk School Board are not criticized by any of the parties to this suit. The minimum levels, and a provision therefor, are here suggested only as safeguards. There being no necessity shown for such provision, this court chooses not to move in an area where no relief is required.

Finally, on the point of plaintiffs' attorneys fees, the Fourth, Sixth and Eighth Circuits have enunciated their views, all three following the same line of reasoning.

The Fourth Circuit in *Bradley* v. *School Board of City of Richmond*, 345 F.2d 310 (4th Cir. 1965), established four basic criteria relating to the problem: (1) only in the extraordinary desegregation case, one of purposeful opposition to desegregation by school officials, should an award be granted, (2) the fact that substantial relief is granted petitioners is not in itself justification for an award, (3) an award should be granted only when the bringing of the litigation should have been unnecessary but for the opposition by the school officials and finally, (4) the District Judge is granted wide discretion in deciding whether conduct of school officials has been so unreasonable as to justify an award.

The Eighth Circuit, citing *Bradley*, in *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965), upheld a denial of attorney's fees to those challenging a school board desegregation plan. The court stressed the wide discretion accorded the court in deciding the question and endorsed the proposition that only cases of extraordinary opposition to desegregation by school officials would justify awards of fees.

Fees were awarded in a Fourth Circuit case, *Bell* v. *School Bd. Powhatan County, Va.*, 321 F.2d 494 (4th Cir. 1963). The facts indicate an extreme case in which no steps had been taken to desegregate, and there was evidence of concerted efforts by school officials to impede attempts of blacks to transfer to the white school. Even there, however, two judges of the Fourth Circuit felt the District Judge's denial of fees was within his broad discretion. *Bradley*, *supra*. Another Fourth Circuit case, *Griffin* v. *County School Bd. Prince Edw.*, 363 F.2d 206 (4th Cir. 1966) allowed an award of fees. Here again the circumstances were extreme. The County Board of Supervisors, having disbursed public school funds to maintain private segregated

schools, were held in contempt of court for their extreme opposition to desegregation efforts.

In *Rolfe* v. *County Board Ed., Lincoln County, Tenn.*, 391 F.2d 77 (6th Cir. 1968) an award of attorney's fees was ordered where the court found that there had been a long, continuing obstruction of desegregation by the defendant school officials and government.

Only in cases of obvious failure by the school officials to make good faith efforts to desegregate, or where prolonged and concerted efforts to impede desegregation are evidenced, is an award of attorney's fees justified. We make a factual determination in this case that there has been, in fact, a good faith effort at desegregation on the part of responsible school officials and local government.

In light of the present Norfolk School Plan of the preceding litigation herein and the totality of the circumstances of this case, attorney's fees for plaintiffs' counsel as an item chargeable to the School Board, is Denied.

An order in keeping with the tenor of this Memorandum Opinion is entered this day.

John A. MacKenzie
United States District Judge

Norfolk, Virginia
July 28, 1971

Supreme Court of the United States

October Term, 1971

No. 71-1317

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,

Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
and
UNITED STATES OF AMERICA,
and
DAVID E. ALLGOOD, ET AL.,

Respondents.

MOTION TO VACATE STAY AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MOTION TO VACATE STAY

Respondents Carlotta Mozelle Brewer and others move the Court to vacate the stay of the mandate of the United States Court of Appeals for the Fourth Circuit dated March 7, 1972 by which the United States District Court for the Eastern District of Virginia at Norfolk is directed "to amend the plan of desegregation for the defendant school district by requiring the school district to provide, either by a bus system of its own or by an acceptable arrangement with the private bus system now operating in the school district, free transportation for all students of the school system assigned to schools located beyond reasonable walking distances of

their homes." By order of the Court of Appeals filed April 3, 1972, the mandate was "stayed until April 18, 1972, in order to permit the defendants to apply to the Supreme Court for a writ of certiorari, or to apply to that Court for a stay." The petition for a writ of certiorari was docketed on the 13th day of April, 1971.

In support of this motion, the respondents show:

I

1. If the stay of the mandate will be vacated, the district court, in compliance with the spirit of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); may join the Council of the City of Norfolk as a party defendant and require the Council and the School Board to make plans, with increased appropriations as necessary, for providing free transportation for the school children without which, as the Court of Appeals has noted, reassignment for purposes of desegregation "becomes a futile gesture and . . . a cruel hoax." Inasmuch as approximately ninety days are required between order and delivery of school buses (*Bradley* v. *School Board of the City of Richmond*, 324 F.Supp. 456, 459 (E.D. Va. 1971)), the courts should require the School Board to promptly decide whether it will transport children by school buses or, if not, by what practical means free transportation will be provided. In either event, and to avoid diminution of the quality of the educational program (Code of Virginia, 1950, § 22-126.1), the cost should be ascertained and included in the city's budget for the fiscal year which will begin July 1, 1972 (Code of Virginia, 1950, § 15.1-160 et seq.).

2. No injury will be occasioned the School Board or the Council if the stay should be vacated. Even if the district

court should require the *purchase* of school buses and this Court should later hold that Norfolk has no obligation to furnish free transportation to school children under the circumstances of this case, there is a growing national demand for school buses which insures that such properties can be resold with minimal financial loss.

3. In the words of the Court of Appeals in its March 7, 1972 opinion in this case at footnote 6, the respondents allege: "The District Court found the cost of installing and operating a transportation system by the school district to be $3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable."

4. Judicial requirement that the Council and School Board make plans for providing free transportation for school children will not even occasion undue inconvenience but will merely insure good faith performance of the undertaking which the School Board indicated when, in its appli-

cation to the Court of Appeals for the stay, it represented: "The appropriate officials of the School Board and the City of Norfolk are in the process of investigating feasible alternative methods of providing public transportation for the school children and the general public of the City of Norfolk, including the financing thereof."

II

5. If the stay of the mandate will continue in force, the defendant School Board and the Council of the City of Norfolk (which by reason of the School Board's objections has not been made a party hereto) will be free from judicial compulsion to provide transportation for the school children during the 1972-73 school session or to make reasonable plans for such; and thousands of Norfolk school children and their parents, including members of the plaintiff class, will be financially disadvantaged without prospect of recovery or, even worse, children will be required to forego school attendance during the 1972-73 school session by reason of their inability to pay the cost of transportation to distant schools to which they have been assigned pursuant to the constitutional command to desegregate schools.

6. Under the desegregation plan for Norfolk's schools, submitted and approved pursuant to this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and companion cases, an estimated 24,000 school children are assigned to schools which are beyond walking distance from their respective homes; some of the distances being as much as nine miles. Norfolk's public schools have an approximate enrollment of 50,000, more than 16,000 of whom are from low income families as are most of the plaintiff class.

7. During 1971-72, student bus fares in Norfolk were increased from 12½ cents to 17½ cents or from $45 to $63 a year. A predictable result of such fare increase was that more children of low income families would have to forego school attendance because of their inability to pay for transportation.

8. If the stay should continue in effect and this Court should ultimately affirm the judgment of the Court of Appeals, thousands of Norfolk school children from families with low income including many children of the plaintiff class, will have been irreparably injured by the wrongful denial of the means to get to the distant schools to which they were assigned pursuant to the desegregation plan. The reward for their quest for equal educational opportunity will have been, in a very realistic sense, a gross denial of any educational opportunity.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EARLIER ASPECTS OF THE CASE

On June 29, 1970 this Court denied the school board's petition for writ of certiorari to the decision of the Court of Appeals for the Fourth Circuit (*Brewer* v. *School Board of City of Norfolk, Virginia*, 434 F.2d 408) which, *inter alia*, directed that "[w]ith respect to elementary and junior high schools, the board should explore reasonable methods of desegregation, including rezoning, pairing, grouping, school

consolidation, and transportation" (*Id* at 412). *School Board of Norfolk, Virginia* v. *Brewer*, 399 U.S. 929.

On or about September 3, 1971 the school board made application to the Chief Justice for a stay of the mandate of the Court of Appeals for the Fourth Circuit which had vacated the district court's August 25, 1971 stay of its July 28, 1971 order requiring transportation of pupils to effect school desegregation; the application having been based on a claim that Executive Order No. 11615, dated August 15, 1971 prohibited the Virginia Transit Company's anticipated fare increase without which the company would not continue to transport children at reduced fares. The school board then asserted: "The only alternative method of obtaining the necessary transportation is for the School Board to establish a school bus system." The application for a stay was denied on September 5, 1971. *School Board of Norfolk, Virginia* v. *Carlotta Mozelle Brewer, et al.*, and *United States of America*, No. ..... October Term, 1971.

On or about September 27, 1971 certain "white defendant-intervenors" made application to the Chief Justice for a stay of the District Court's July 28, 1971 order requiring transportation of pupils to effect school desegregation. The application was denied. *David E. Allgood, etc., et al.* v. *Carlotta Mozelle Brewer et al.*, No. ..... October Term, 1971.

The history of sixteen years of active litigation of this case in the lower courts is set forth in the appendix to this brief.

QUESTIONS PRESENTED

The petitioners' statement of questions presented makes certain assumptions which the respondents are unwilling to admit. Hence, we restate those questions, viz:

1. Whether this school board must defray costs of all transportation which is necessary to the disestablishment of

racial segregation in the public schools and to the maintenance of equality of benefits accorded students similarly situated.

2. Whether an appellate court may mandate an award of counsel fees to successful plaintiffs in a school desegregation case.

3. Whether, by virtue of the stay granted pursuant to F.R.A.P. 41(b), the pendency of the instant petition will absolve the school board of its responsibility to order school buses in sufficient time to furnish transportation during the 1972-73 session.

STATEMENT OF ADDITIONAL FACTS

The board estimates that 24,000 pupils will require transportation. Norfolk's public schools have an approximate enrollment of 50,000, more than 16,000 of whom are in low income families.

Since 1942 Virginia has offered assistance to local school district transportation programs covering maintenance, operating expenditures, bus replacement costs, etc. (25 Tr. 60, 74). Up to 100% of operating expenditures qualify for reimbursement upon the application of a school district.

For many years, the Virginia Transit Company has operated special school busses in conjunction with the school board. These buses are routed to pick up students near their homes each morning and transport them to the school of their assignment. Over the years, the City of Norfolk has subsidized the cost of transporting more than 8,000 students daily, thus permitting them to ride at one-half of the normal fare.

"The District Court found the cost of installing and operating a transportation system by the school district to be

$3,600,000. Of this sum, however, approximately $3,000,000 represented capital outlays, covering purchases of buses and the acquisition and equipping of service yards. These expenditures are normally funded and are not considered an operating expense. The annual operating expense of the bus system for the school district was fixed at about $600,000, of which 47 per cent would be reimbursable by the State. It would seem reasonable to assume that an annual operating budget of $600,000 by the district (supplemented as it would be with State aid) would cover the operating costs of the system and provide adequately for normal amortization of the capital expenditures required for the purchase of buses and for the acquisition of service facilities. Such an expenditure from a school budget of over 35 million dollars would be in line with what was considered reasonable in *Swann*, where an increased annual operating expense of $1,000,000, imposed on a total school budget of $66,000,000, was held reasonable" (Slip Op. footnote 6).

REASONS FOR DENYING THE WRIT

I.

Free Pupil Transportation

A.

Free Transportation, As Mandated By The Court Below, Is Clearly Required By Prior Decisions Of This Court.

By necessary implication, this Court has shown that this school board must furnish free transportation. In affirming the district court's order in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26-27 (1971), and with specific reference to an optional majority-to-minority transfer provision, this Court indicated:

> "In order to be effective, such a transfer arrangement must grant the transferring student *free* transportation [emphasis supplied] and space must be made available in the school to which he desires to move. Cf. Ellis v. Board of Public Instruction, 423 F.2d 203, 206 (C.A. 5 1970). The court orders in this and the companion Davis case now provide such an option."

It should go without saying that the school board has at least an equal duty to transport students whom it assigns to distant schools to accomplish desegregation as it has to transport the student who voluntarily seeks such assignment to avoid being in a racial majority.

After showing the peculiar appropriateness of the use of transportation in the Charlotte-Mecklenburg (North Carolina) system and in the Mobile, Alabama system as well, the Court in *Swann,* said:

> "Desegregation plans cannot be limited to the walk-in-school." (402 U.S. at 30)

Then the Court mentioned one possible valid objection to transportation of students to accomplish desegregation, i.e., "when the time and distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" (*Ibid*).

In their considerations of plans for the use of transportation to accomplish desegregation, district courts are charged, by *Swann*, to consider the discussions under (1) Racial Balances or Racial Quotas, (2) One-race Schools and (3) Remedial Altering of Attendance Zones. They are not enjoined to measure relief by the extent to which the subject school district may have previously transported students.

The lower courts are charged, by *Swann,* to reconcile competing values, as courts have traditionally done, in fash-

ioning remedial measures. In so doing they must keep in mind the goal of equal educations opportunities for *all* children; those who live near and those who live far from school and, also, those whose parents are affluent and those whose parents are indigent. "Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms." *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 493 (1954). That constitutional imperative transcends fiscal policies and budgetary prerogatives. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964).

Here, the Court of Appeals considered the problem of expense and concluded that the cost of busing in this case is not unreasonably burdensome (Slip Op. p. 8, footnote 6). Quite appropriately, the court, sitting *en banc*, unanimously required this school board "to provide . . . free transportation for all students of the school system assigned to schools located beyond reasonable walking distance of their homes" (Judgment filed May 7, 1972).

Unquestionably, desegregation in Norfolk cannot be accomplished without transportation. It seems to be equally clear, as a matter of paramount law in Virginia, that "public elementary and secondary schools for all children" shall be free, and shall be compulsory for "every eligible child of appropriate age, such eligibility and age to be determined by law" (Constitution of Virginia (1971), Article VIII, Education §§ 1, 3). No child, regardless of the affluence or poverty of his parents (who may or may not be hostile to the desegregation process), can be crushed between the state law which says he must attend school and the federal law which requires his assignment to a school remote beyond his means of locomotion. The court below was imminently correct in holding that "the Court cannot compel the student

to attend a distant school and then fail to provide him with the means to reach that school" (Slip Op. p. 9).

As was demonstrated in *Swann* (402 U.S. at 7), residential patterns in metropolitan areas have resulted from federal, state and local government action; and school board action, particularly, with reference to the sites and sizes of schools, based on these patterns have resulted in segregated education. Now, in obedience to the constitutional mandate to desegregate schools, the state assigns children to schools distant from their homes. Consideration of these facts impelled the court below to hold "that the school district as a part of its plan of desegregation must provide a practical method of affording *free* busing for students assigned to schools beyond normal walking distance of their homes; the mechanics of the method to be employed by the school district in discharge of this duty [being] for the District Court" (Slip Op. pp. 10-11).

B.

The Apparent Conflict Between Circuits, If Real, Is Insignificant

The school board argues that there is a conflict between circuits concerning provisions of free transportation and points to the one short paragraph in *Clark* v. *Board of Education of Little Rock School District*, 449 F.2d 493, 499 (8th Cir., 1971) wherein the Eighth Circuit altered the district court's free transportation requirement by excluding "students who continue to attend the secondary school closest to their home"; it having been the *feeling* of the Court of Appeals that the constitutional rights of such students have not been or will not be affected. It is quite apparent that the Eighth Circuit overlooked the very likely protest of some excluded student that he must pay for transportation

to and from school while others similarly situated ride shorter distances at public expense.

The reasoning adopted by the *Fourth* Circuit in the instant case finds support in the April 11, 1972 decision of the Fifth Circuit in *United States of America* v. *Greenwood Municipal Separate School District, et al.*, ...F.2d ..... (5th Cir. No. 71-2773) which reversed the district court's denial of free transportation for black students residing in non-contiguous or satellite zones. (The opinion is reproduced in the appendix hereto.) Rejecting the government's suggestion of remand for inquiry by the district court as to the transportation needs of the students and the ability of the school district to meet those needs, the Court of Appeals said:

> "It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here." (Slip Op. pp. 4, 5)

The only uncertainty, if any, is whether equal protection is being accorded the student who is denied free transportation because his school, although beyond walking distance, is the closest school to his home. After considering the cost involved, the court below forestalled the uncertainty, and avoided the further equal protection question, by requiring

free transportation of all students who live beyond normal walking distance. In the *Greenwood* case, the Fifth Circuit did not have before it the facts respecting the needs of the individual students and the ability of the school district to meet those needs. It dealt only with the problem which was most urgent—the transportation of children whom the court had required to be assigned to distant schools. In the *Clark* case, the Eighth Circuit did not state the facts or articulate its reasoning which caused it to "feel that the constitutional rights of the [excepted] students have not been or will not be affected."

The petitioners do not claim that the Fourth Circuit's order requires them to transport a significant number of children from their homes to the closest school. It appears that the difference in budgetary commitment will be slight. Moreover, the appropriate case in which to test the equal protection right of a student to free transportation to a school which, although beyond normal walking distance, is closest to him would seem to be a case in which such a student is a party.

II.

Allowance Of Counsel Fees To Plaintiffs

There is no general rule prohibiting the allowance of counsel fees in the absence of statute. As was pointed out by Judge Winter, especially concurring with the court below, the Fourth Circuit has directed the allowance of counsel fees to plaintiffs in several school desegregation cases, e.g., *Bell* v. *School Board of Powhatan County, Virginia*, 321 F.2d 494 (4th Cir. 1963); *Brown* v. *County School Board of Frederick County, Virginia*, 327 F.2d 655 (4th Cir. 1964); *Griffin* v. *Board of Supervisors of Prince Edward County*, 339 F.2d 486 (4th Cir. 1964), reversed on other grounds, 377 U.S.

218 (1964); *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

Although it then denied the prayer of plaintiff-appellants for an award of counsel fees, the Eighth Circuit in *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661, 671 (8th Cir. 1966), warned: "The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights." In the 1971 appeal of the same case, that court held: "The plaintiff should no longer be required to bear the continuing expense of attorneys' fees to vindicate their constitutional rights. They are entitled to attorneys' fees for services performed by them in processing this appeal and cross-appeal" (449 F.2d at 493).

The respondents are in accord with the views expressed by Judge Winter, concurring specially in the judgment below:

> "The time is *now* when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of 'unreasonable, obdurate obstinacy.'" (Slip Op. p. 30)
>
> "It seems . . . to be appropriate now to hold . . . that reasonable and adequate counsel fees should be awarded as of course unless special circumstances would render an award unjust." (*Id.*, p. 29)

These views are particularly appropriate in the light of this school board's long continued pattern of evasion of its duty to desegregate and its persistent obstruction of the efforts of the plaintiffs to realize the promise of the 1954 *Brown* decision, an outline of which is set forth in the appendix to this brief as "The History of This Litigation In The Lower Courts."

Although the respondents believe that a similar pronouncement from this Court would greatly accelerate the course of school desegregation across the land, they urge denial of the instant petition for reasons above shown and for a further reason next stated.

III.

The Pendency Of The Instant Petition, Coupled With The Stay Granted Pursuant To F.R.A.P. 41(B), Shields The School Board From Its Responsibility To Order School Buses Now

The petition points out that the Virginia Transit Company has served notice on the City of Norfolk that it will terminate service for all passengers on August 23, 1972. This being so, the plan for desegregation of Norfolk's schools may fail for the 1972-73 school session unless the school board will acquire school buses in sufficient number to provide transportation for the students assigned to schools remote from their homes.

In another school desegregation case pending in the Eastern District of Virginia, Richmond Division, the evidence indicated that approximately ninety days are required between order and delivery of transportation equipment (*Bradley* v. *School Board of the City of Richmond*, 324 F. Supp. 456, 459 (E.D. Va. 1971)). But for the stay granted pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and the timely filing of the instant petition, the school board might even now be ordering school buses and seeking appropriation of funds with which to defray the cost of a school transportation system.

Of course, considering the likelihood that the City of Norfolk will assume the operation of the transit system, transportation of school children might be accomplished through that system. In such event, however, the right of

school children to free transportation to distant schools, as recognized by the court below, should not be impaired. During 1971-72, and at the instance of the school board, student fares were raised from 12½¢ to 17½¢ (from $45 a year to $63): If the city-operated transit systems can charge children any amount to get to and from the schools to which they have been assigned, it can charge enough to place free public education beyond the reach of the vast majority of the plaintiff class.

CONCLUSION

Unless the instant petition will be promptly denied or unless the stay will be promptly vacated, this school board may again delay desegregation for yet another year or, even worse, it may deny public education to a large number of the children whose predecessors sought relief at the hand of the federal court in May of 1956.

Respectfully submitted,

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APPENDIX

APPENDIX I

The History Of This Litigation In The Lower Courts

In this sixteen-year-old litigation to desegregate the Norfolk, Virginia public schools, the reported opinions are numerous. Nearly every conceivable tactic to delay, frustrate and avoid the mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) has been raised.

After the complaint was filed in 1956, all action was deferred pending the holding of a planned special session of the Virginia Legislature on the subject of school integration, and then again pending the effective date of the "massive resistance" legislation passed at the special session. On January 11, 1957, the district court denied the school board's motion to dismiss, and on February 12, 1957, the district court entered an injunction against the school authorities restraining them from:

> refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in such school.

Beckett v. *School Bd. of City of Norfolk*, 148 F. Supp. 430, 2 Race Rel. L. Rep. 337 (E.D. Va.), *both aff'd sub nom. School Bd. of City of Newport News* v. *Adkins*, 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). However, all proceedings were again stayed pending disposition of appeals and petitions for certiorari. It was not until July, 1958 that the school board adopted pupil placement criteria and procedures. The board thereupon denied all 151 applications filed by black students to attend previously all-white facilities during the 1958-59 school year. 3 Race Rel. L. Rep. 945 (1958). The district court ordered the board to

reconsider and on August 29, 1958, the board announced that seventeen of the transfer requests would be granted. 3 Race Rel. L. Rep. 955 (1958). The board sought an additional delay in admitting the seventeen black students, but the district court denied it and the court of appeals affirmed. *Beckett* v. *School Bd. of City of Norfolk*, 3 Race Rel. L. Rep. 1155 (E.D. Va.), *aff'd* 260 F.2d 18 (4th Cir. 1958). On plaintiff's cross-appeal from the district court's refusal to order the admission of the remaining 134 students, the matter was remanded since the district court had indicated he would consider separately the validity and application of the criteria under which the applications were denied. The schools to which the seventeen Negro students were assigned, however, were closed, pursuant to Virginia's "school closing" laws, from the fall of 1958 until February, 1959, when the laws and similar Norfolk City ordinances were declared unconstitutional in *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959; 3-judge court); *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959); *James* v. *Duckworth*, 170 F. Supp. 342 (E.D. Va.), *aff'd* 267 F.2d 224 (4th Cir.), *cert. denied*, 361 U.S. 835 (1959). At that time plaintiffs' supplemental 3-judge court complaint was dismissed as moot, and late in the 1958-59 school year, the district court refused to overturn the board's denial of the 134 transfer applications, holding its placement principles facially constitutional. *Beckett* v. *School Bd. of City of Norfolk*, 181 F. Supp. 870, 870-81 (E.D. Va. 1959), *aff'd sub nom. Hill* v. *School Bd. of City of Norfolk*, 282 F.2d 473 (4th Cir. 1960). The district court subsequently permitted the board to assign pupils by these principles, although holding that the board need not utilize the procedures of the Virginia Pupil Placement Board in view of that agency's policy of not granting any transfer requests. *Beckett* v. *School Bd. of City*

of Norfolk, 185 F. Supp. 459 (E.D. Va. 1959), *aff'd* 181 F.2d 131 (4th Cir. 1960). During 1961 and 1962, the district court had occasion to review and overturn school board denials of black students' transfer requests (unreported opinions) although there was no across-the-board attack on assignment procedures. However, when in 1963 the plaintiffs filed a motion for further relief, the board discarded pupil placement and proposed what has come to be known as the "Norfolk choice" plan—transfer between black and white schools located within the same attendance area. This plan was approved by the district court and on plaintiffs' appeal the court of appeals reversed and remanded for reconsideration in light of its then recent decisions in this field. The district court was specifically instructed to consider the legality or propriety of superimposing a city-wide zone for all-black Booker T. Washington High School on all other city high school zones. *Beckett* v. *School Bd. of City of Norfolk,* 9 Race Rel. L. Rep. 1315 (E.D. Va. 1964), *vacated and remanded sub nom. Brewer* v. *School Bd. of City of Norfolk,* 349 F.2d 414 (4th Cir. 1965). Proceedings subsequent to that remand and negotiations between the parties resulted in the entry of a consent order on March 17, 1966, approving a new desegregation plan. *Beckett* v. *School Bd. of City of Norfolk,* 11 Race Rel. L. Rep. 1278 (E.D. Va. 1966). Under that plan, reluctantly approved by the district court, there were multiple-school zones but at the high school level, transfers between the three white high schools and Booker T. Washington High were permitted only to facilitate integration. The following year, completion of Lake Taylor High School necessitated the filing of an amended plan by the school board, proposing five high school zones, and allowing only Booker T. Washington students to transfer to schools outside their zone of residence. The district

court required that transfer privileges be extended to all high school students but rejected plaintiffs' attacks upon the zone lines and upon the proposed replacement of Booker T. Washington High School on the same site. The court of appeals reversed and remanded, directing the district court to consider, with respect to both issues, whether segregated neighborhood patterns in Norfolk resulted from racial discrimination, of which the board was seeking advantage in its zone lines. *Beckett* v. *School Bd. of City of Norfolk*, 269 F. Supp. 118 (E.D. Va. 1967), *rev'd sub nom. Brewer* v. *School Bd. of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968). The district court found the appellate court's decision "vague and confusing." 302 F. Supp. at 20. Negotiations between the parties following the remand failed to produce agreement. As an interim plan for 1969-70 the school board proposed zone line changes between Lake Taylor and Booker T. Washington to increase integration, and similar changes between Maury and Granby. After hearings in the Spring of 1969, the district court approved the interim plan for 1969-70. *Beckett* v. *School Bd. of City of Norfolk*, 302 F. Supp. 18 (E.D. Va. 1969). After extensive hearings in the Fall of 1969 on the long-range plan of desegregation for 1970-71 and thereafter, the district court approved the school board's submission. *Beckett* v. *School Bd. of City of Norfolk*, 308 F. Supp. 1274 (E.D. Va. 1969). The court of appeals reversed and remanded stating that the plan, whereby 76% of the black elementary pupils would be assigned to 19 all-black schools, 40% of the white elementary pupils would be assigned to 11 white schools, 57% of the black junior high pupils would be assigned to 3 black schools, one all-white junior high school would remain, and segregated high schools would remain, was constitutionally impermissible. *Brewer* v. *School Bd. of City of Norfolk*, 434 F.2d 408 (4th

Cir. 1970). On remand the school board submitted a plan with results similar to those rejected by the court of appeals. The district court accepted the plan with certain modifications. *Bedkett* v. *School Bd. of City of Norfolk*, Civ. Action No. 2214 (E.D. Va. August 14, 1970). All parties except the United States appealed from the district court's decision. The court of appeals delayed its consideration of the case pending this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1 (1971) and companion cases.

On June 10, 1971, *sub nom. Adams* v. *School District No. 5*, 444 F.2d 99 (4th Cir. 1971), the court of appeals remanded to the district court with instructions to receive from the school board a new plan which would give effect to this Court's decisions in *Swann*, *supra*, and *Davis* v. *Board of School Commissioners of Mobile County*, 401 U.S. 333 (1971).

On remand the school board's proposed new plan was approved, as modified, by order of July 28, 1971. On August 25, 1971, in an order indefinitely staying its order of July 28, 1971, the district court allowed the school system to commence the 1971-72 school year under the 1970-71 plan on the ground that Executive Order No. 11615 (the "'price freeze" order) "impeded" the undertaking of the Virginia Transit Company to transport children to school. On September 2, 1971, the court of appeals vacated the stay on the ground that "the School Board cannot avoid its constitutional duty to desegregate the schools by pleading that the bus company might lose money because of the price freeze."

On March 7, 1972 the Court of Appeals decided the appeals of the black plaintiffs and the white intervenors and held that the district court had properly approved the

plan. The Court also held that the Board was required to provide free transportation to pupils who live beyond normal walking distance of their assigned schools and that the board must pay fees to the plaintiffs' attorneys for their service in securing free transportation for the students. *Brewer* v. *The School Board of the City of Norfolk*, ... F.2d ..... (4th Cir. No. 71-1900, March 7, 1972).

APPENDIX II

In The
United States Court of Appeals
for the Fifth Circuit

No. 71-2773

United States of America,

Plaintiff,

versus

Greenwood Municipal Separate School District, et al.,

Defendants,

Lilly Russell, et al.,

Plaintiffs-Appellants,

versus

Greenwood Municipal Separate School District, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

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(April 11, 1972)

Before Wisdom, Coleman and Simpson, Circuit Judges.

Per Curiam: Once more we are called upon to deal with the desegregation problems of the Greenwood Municipal Separate School District.[1] Pursuant to our remand of June 29, 1971, 445 F.2d 388, 389, for the entry of an order requiring the implementation of a plan complying with former decisions of this Court and with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, the district court ordered the school district to provide free bus transportation to students who elect, on an individual basis, to change schools under the majority-to-minority transfer provision[2] of the District's court ordered desegregation plan. With respect to elementary students who, in accordance with the desegregation plan, were placed in noncontiguous school zones and required to attend school outside their neighborhoods, the lower court declined to require the school district to provide free transportation. The plaintiffs have appealed from the district court's refusal to order free bus transportation for the latter class of students.[3]

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[1] In chronological order we have dealt with this District's problems in the following cases: *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1969, 406 F.2d 1086, cert. denied 1969, 395 U.S. 907, 89 S.Ct. 1749, 23 L.Ed.2d 220; *United States* v. *Greenwood Municipal Separate School District*, 5 Cir. 1970, 422 F.2d 1250; *Russell* v. *Greenwood Municipal Separate School District*, 5 Cir., June 29, 1971, 445 F.2d 388; *United States* v. *Greenwood Municipal Separate School District*, 5 Cir., July 2, 1971, 444 F.2d 544, vacated as moot by *en banc* Court, ... F.2d ..... (January 12, 1972). The desegregation suit was originally instituted by the United States in July, 1966.

[2] This provision entitles a student to transfer from a school in which his or her race is in the majority to a facility in which his or her race is in the minority.

[3] The United States as a party to this case did not initiate the motion involved in this appeal, but did participate in the lower court's proceedings and has failed an amicus curiae brief with this Court.

On this appeal, the Negro plaintiffs contend that the failure of the district court to order free transportation for those elementary students placed in noncontiguous zones will require black students transferred to the previously all-white Bankston School to walk two miles each way, across the main lines of the Illinois Central Railroad, through the central business district, across the Yazoo River, and along a main thoroughfare for one-half mile. The school district responds by arguing that the provision of free transportation is merely a matter of convenience for the black elementary students involved, that these black students have no constitutional claim to free transportation, that the school district has never furnished transportation to students who reside within the corporate limits of Greenwood, and that the school district is without funds to provide the requested transportation. The lower court, in addition to giving reasons for its decision essentially similar to those advanced by the school district on this appeal, observed that this court has previously required the provision of free transportation to students who elected to change schools under a majority-to-minority transfer plan but that we have never heretofore directed a school district to provide free transportation for children placed in noncontiguous zones who go to schools outside their neighborhoods.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, supra, the Supreme Court explicitly held that a school district which elects to utilize a majority-to-minority transfer plan as a desegregation tool *must* provide free transportation to each student making a transfer under the plan. 402 U.S. at 26, 27, 91 S.Ct. at 1281, 28 L.Ed.2d at 572, 573. In discussing the pairing and noncontiguous zoning techniques ordered by the trial court in *Swann*, the Supreme Court approved the trial court's direction to the educational authori-

ties that bus transportation be used to implement these techniques:

> "In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

The plaintiffs and the United States are not in agreement as to the appropriate disposition of this case. The plaintiffs urge us to direct the district court to order the school district to provide free bus transportation to the elementary students placed in noncontiguous attendance zones. The United States asks us to remand the cause to the district court with instructions "to permit the parties to present evidence as to the transportation needs of students and the ability of the school district to meet those needs, and to make full findings of fact or opinion and findings."

We have again reviewed the extensive record in this proceeding and conclude that it is unnecessary to remand the cause to the district court for the hearing and findings suggested by the United States. It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them

and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here.

The judgment of the district court, insofar as it refused free transportation to elementary students zoned noncontiguously to attend school outside their neighborhoods, is reversed and the cause is remanded with directions that the district court without delay require the school district to provide such transportation to the affected elementary students.

Let our mandate issue at once.

Reversed and Remanded with directions.

Coleman, Circuit Judge, dissents.